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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CHRISTOPHER NATHANIEL EL-BEY-WASHINGTON, Plaintiff and Appellant, v. ELLAOISE WASHINGTON, Defendant and Respondent.	F076163 (Super. Ct. No. 16-C0245) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Christopher Nathaniel El-Bey-Washington, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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[*] Before Levy, Acting P.J., Franson, J. and Smith, J.

Appellant Christopher Nathaniel El-Bey-Washington, a California prisoner appearing in pro per, appeals the dismissal of his civil complaint against respondent Ellaoise Washington. The trial court based the dismissal of the complaint on appellant's failure to provide notice that the complaint was properly served on respondent. On appeal, appellant contends the court denied his right to have the court waive service fees based on his indigency. Upon review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On August 8, 2016, appellant filed a civil complaint alleging respondent breached the terms of a loan between the parties and breached an agreement to help appellant with a civil case in Kansas. The parties entered into a loan in 2012 and respondent allegedly breached the terms of the loan later that year. After the complaint was filed in 2016, the court held several case management conferences while awaiting appellant to serve respondent with the complaint. The court held a conference on December 6, 2016, and continued the matter to allow additional time for appellant to provide proof of service to the court. Additional case management conferences were held on January 20, 2017, March 21, 2017, April 24, 2107, and May 26, 2017. At the May 26, 2017 conference, the court notified appellant that should proper service not be effectuated prior to the next hearing scheduled for July 13, 2017, the matter would be dismissed for failure to prosecute.

According to the docket, on June 14, 2017, the court rejected and returned a proof of service form to appellant noting the form appeared to have been altered and the form

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1 The record provided on appeal appears incomplete. An appellant has the burden of providing an adequate record. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) The failure to provide an adequate record on an issue requires that the issue be resolved against appellant. (*Id.* at pp. 1295-1296; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) For example, appellant did not provide a copy of the minute order dismissing the action. The only evidence contained in the appellate record indicating the dismissal of the action is the court docket and an order denying a motion for reconsideration.

did not show what documents were served on respondent. On July 3, 2017, appellant filed an ex parte application for an order for publication of the summons. On July 13, 2017, the court held a case management conference, denied the motion for publication, and dismissed the case for failure to prosecute.[2]

Appellant filed a motion for reconsideration on July 20, 2017. The trial court denied the motion on July 24, 2017. The court noted appellant had been trying to serve respondent, a resident of Kansas, since the summons issued in August 2016. The court explained the complaint was mailed by certified mail to respondent, but there was no signed receipt so default could not be entered. The court also noted that a company from Ohio served respondent, however, the proof of service only indicated respondent was served with a "'package,'" and therefore was insufficient because it did not state respondent was served with a copy of the summons and complaint. Lastly, the court explained the request for publication was denied because appellant had not shown that respondent could not be served by other means at her address in Kansas. As appellant did not provide any new facts as to how he would serve respondent if provided another opportunity, the court denied the motion and affirmed the dismissal of the action.

On August 2, 2017, appellant filed a notice to appeal of the order dismissing the action.

DISCUSSION

Appellant challenges the trial court's dismissal of his case with prejudice. The California Supreme Court has instructed that an order dismissing an action is presumed correct and may not be reversed on appeal unless the appellant meets his or her burden of

[2] The sole evidence provided in the appellate record of these events are the notes contained in the trial court's docket.

showing that the trial court abused its discretion. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.)[3]

The trial court acted within its discretion in imposing a sanction of dismissal. Government Code section 68608, subdivision (b), permits a trial judge to dismiss an action for failure to comply with provisions of the Trial Court Delay Reduction Act "if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case." As suggested by that language, in deciding whether to impose the sanction of dismissal, "judges are required to consider the history of the conduct of the case." (*Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, 1061.) Dismissal of an action is appropriate only if less severe sanctions would be ineffective. (*Id.* at pp. 1061-1062.)

The trial court dismissed the action because appellant failed to timely serve his complaint in compliance with California Rules of Court, rule 3.110b, which provides that a "complaint must be served on all named defendants and proofs of service on those defendants must be filed with the court within 60 days after the filing of the complaint." Therefore, dismissal of his action for noncompliance with that rule is appropriate unless less severe sanctions would have been effective.

The record reflects that lesser sanctions would not have been effective in this case. Although appellant made some efforts to attempt to serve respondent with the complaint, the court provided appellant five extensions of time to complete service. During that time, appellant mailed the complaint to respondent using certified mail, but failed to obtain a return receipt as required by Code of Civil Procedure section 415.40. Appellant also hired an Ohio company to effectuate service, however, the proof of service prepared

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[3] Not surprisingly, as she was not served, respondent did not file a brief in this appeal. Even in the absence of a respondent's brief, however, an appellant has the burden of showing reversible error. (See *County of Lake v. Antoni* (1993) 18 Cal.App.4th 1102, 1104; Cal. Rules of Court, rule 8.220(a)(2).)

did not indicate that respondent was served with the summons and complaint. Finally, appellant filed an application for service by publication, but the court determined that appellant had not made a sufficient showing that respondent could not be served by another method.

Based on appellant's continued inability to effectuate service, it was not unreasonable for the court to conclude that a sanction less than termination of the action would have been sufficient to obtain appellant's compliance with the rules for service. Appellant does not complain that he lacked notice or an opportunity to be heard before his case was dismissed, nor could he. As described, the trial court specifically warned appellant that it would dismiss the complaint for failure to prosecute if he had not completed service prior to the next case management conference. As appellant failed to serve respondent with the complaint before the next case management conference, the court dismissed the action.

Appellant contends the trial court erred by not ordering that respondent be served without cost based on appellant's indigency. We conclude the argument is without merit. Indigency was not the cause of appellant's failure to serve. The court rejected appellant's attempt at service by certified mail because the return receipt was not proper. Based on the record provided, there is no reason to believe that appellant was foreclosed from attempting service again by certified mail under Code of Civil Procedure section 415.40. As such, appellant did not make a sufficient showing of need for personal service. However, as noted in the trial court's order on the motion for reconsideration, appellant did not explain nor state he would attempt to serve appellant by mail, if provided the opportunity. We note that appellant may not avoid compliance with the rules of civil procedure because he is a self-represented inmate. The California Supreme Court has instructed that "mere self-representation is not a ground for exceptionally lenient treatment." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984.)

DISPOSITION

The judgment is affirmed. Each party to bear his or her own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).) Additionally, appellant's "Notice of Motion and Request Complaint Concerning Judicial Performance" is denied.[4]

[4] On March 6, 2019, appellant filed the above motion. While labeled a complaint concerning judicial performance, the contents of the motion appear to be a request for the status of the appeal. As the appeal is hereby adjudicated, the motion is denied as moot.